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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-290 (Sub- No. 311X)

**NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION –
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MARYLAND**

**COMMENTS / REPLY TO PETITION TO STAY AND
PETITION TO REOPEN APRIL 5, 2010 DECISION**

1. I, Carl Delmont, herewith provide my Comments to Norfolk Southern Railway Company's Petitions for Exemption, and my Reply to James Riffin's ("Riffin") Petition for Stay and Petition to Reopen.

BACKGROUND INFORMATION

2. On April 5, 2010, the Board in the above entitled proceeding, served a decision granting Norfolk Southern Railway Company ("NSR") authority to abandon its operating rights on that portion of the Cockeysville Industrial Track ("CIT") that lies between Mileposts UU 1.0 and UU 15.44, and exempted the proceeding from the Offer of Financial Assistance ("OFA") procedures. The Board's Order stated the exemptions would become effective on May 5, 2010.

COMMENTS – DENIAL OF DUE PROCESS

3. “Due process requires, at a minimum, ... there must be **notice and an opportunity to respond.**” *Talley v. Talley*, 317 Md. 428, 434-435 (1989). (Emphasis added.) In accord: *Blanton v. Equitable Bank Nat’l Ass’n*, 61 Md. App. 158, 166 (1985); *Miranda v. Southern Pacific Transp. Co.* 710 F.2d 516, 522-23 (1983); *Zkravkovich v. Bell Atl-Tricon Leasing*, 323 Md.200, 209-210 (1991); *Roadway Exp. Inc. v. Piper*, 447 U.S.765, 767, 100 S.Ct. 2455, 2464 (1980).

4. On January 5, 2010, Zandra Rudo (“Rudo”), Lois Lowe (“Lowe”) and I filed Notices to Participate as a Party of Record and personally signed the Notices to Participate. NSR moved to strike the notices, arguing that the notices were “from persons unidentified and unidentifiable.” NSR January 14, 2010 Motion to Strike, p. 4. In a decision served on March 22, 2010, the STB struck Rudo’s, Lowe’s and my Notices to Participate, stating:

“Of those individuals purportedly seeking to participate, only Riffin and now Eric Strohmeyer have submitted sufficient information to be listed as parties of record. Accordingly, NSR’s motion to strike the participation Notice is granted as to all of the named individuals except for Riffin.” Op. at 3.

5. Following the Board’s March 22, 2010 Decision, on March 23, 2010, I spoke with Jo Dettmer, the STB’s Deputy Director of Proceedings. During my telephone conversation, I offered to provide the STB with a photocopy of my Maryland Driver’s License, to establish my identity. Mr. Dettmer explicitly stated that that was not necessary, for in his opinion, I was ‘identified.’ Not willing to trust Mr. Dettmer’s oral assurance, I filed a Motion for Protective Order with the STB along with a photocopy of my driver’s license (under seal). As it turned out, it was good I ignored Mr. Dettmer’s assurance and sent a photocopy of my driver’s license to the STB, since the STB did not acknowledge that I was ‘identified,’ and that I became a party, until March 26, 2010, the date the photocopy of my driver’s license arrived at the STB.

6. On page 5 of its March 22, 2010 Decision, the STB made the following statements:

"In the interest of compiling a full and complete record, the Comments, as amended and supplemented, will be accepted into the record solely on behalf of Riffin. However, Riffin is advised that he has had a full and fair opportunity to respond to the NSR petition for exemption. ... Accordingly, any further submissions by Riffin to supplement the record will be looked upon with disfavor by the Board." (Emphasis added.)

7. It was not until the Board served its April 5, 2010 Decision that Rudo, Lowe and I were informed that we had the right to participate as parties of record. Unfortunately, our right to participate was purely illusory, since the right to participate was granted on p.2 of the STB's April 5, 2010 Decision, then rendered moot on p. 8 of the April 5 Decision, where the STB granted NSR's request to exempt the proceeding from the OFA procedures.

8. This failure to permit Rudo, Lowe and I to actually participate meaningfully, and to submit evidence to the STB regarding our interest in preserving the CIT for our freight rail needs, and the interest in freight rail service of six other shippers, denied us our "opportunity to respond," *Roadway Express, op. cit.*, and thus denied us our Due Process Right to participate in the proceeding. It was an egregious violation of my Due Process Rights to strike my Notice of Intent to Participate as a Party of Record, to abrogate my Due Process Right to submit comments and evidence of shipper interest in the CIT, and to exempt the proceeding from the OFA procedures before I was given an opportunity to participate in a meaningful way.

9. In November, 2009, in anticipation of NSR's Petition to abandon the CIT, shippers who had executed letters of interest / opposition to loss of freight rail service in 2006, executed new letters of interest / opposition to loss of freight rail service. Since Ms. Lowe is the Executive Secretary of the Cockeyville Rail Line Shippers Coalition, she, rather than Riffin, was the appropriate party to submit to the STB under seal, copies of letters from shippers expressing a desire for rail service in Cockeyville. This

is the reason why Riffin did not include these shipper's letters in his Protective Order. Since in its March 22, 2010 decision, the STB expressly denied me the right to participate as a party, and since the STB expressly stated that it would look upon any additional filings by Riffin "with disfavor," Riffin complied with the STB's 'order' by not filing any additional material, and I waited until the STB granted me authority to participate. But at the moment the STB granted me authority to participate, it also summarily took away my right to participate, by rendering its decision exempting the proceeding from the OFA procedures.

10. Since the STB gave no weight to the shippers' letters previously filed by Riffin, due to the lack of verification, the shippers have reexecuted **verified** letters opposing loss of rail service on the CIT, indicating their desire for rail service, and further indicating the commodities they would ship and the estimated number of rail cars per year they would ship. The total number of rail cars these eight shippers would ship, 260, is 70 more than the 190 cars NSR stated that it shipped **at a profit**. See *Petition for Exemption – Norfolk Southern Railway Company*, AB 290 Sub No. 237X.

11. In a separate filing, Ms. Lowe has filed a Supplement to her Motion for Protective Order, which Supplement includes, under seal, eight verified letters from shippers who desire freight rail service on the CIT, and who object to the loss of freight rail service on the CIT.

COMMENTS – THE STB LACKS JURISDICTION TO ASCERTAIN THE SCOPE OF THE PROPOSED ABANDONMENT

12. On page 6 of its Petition for Exemption, NSR states:

"The Line is located between railroad milepost UU-1.00 (located just north of Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU-15.44."

13. The statements “just north of Wyman Park Drive” and “south of the bridge at railroad milepost UU 15.44” are very imprecise. NSR and the MTA equivocate: In its Petition, NSR said the Line ends at MP 15.44, even though it also said in its footnote 11, that the Final System Plan only conveyed to MP 15.4. The MTA said in its April 26, 2010 Reply to Riffin’s Petition for Stay, that the Line ends at MP 15.4, which is what the Final System Plan states. The MTA further stated in its April 26 Reply at p.4:

“Neither that deed nor any other evidence offered by Riffin specifies that ‘Bridge No. 16’ means ‘the bridge at MP 15.96.’ ”

14. The U.S. Court of Appeals, District of Columbia Circuit, recently stated in *Consolidated Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009), that where the Board’s authority was challenged and an interpretation of the Final System Plan or the Special Court’s conveyance order under 45 U.S.C. 719(e)(2) was required, the Board lacked jurisdiction to resolve the question of the nature of the trackage sought to be abandoned.

15. In this proceeding, NSR has failed to identify precisely where the Line it proposes to abandon is located, and has failed to precisely indicate the scope of the conveyance to Conrail pursuant to the Final System Plan. NSR states in its Petition that it seeks to abandon to a point “south of the bridge at railroad milepost UU-15.44.” Petition at 6. How far south of the “bridge at milepost UU - 15.44” is not specified. NSR does not indicate where the “Bridge at milepost UU 15.44” is located.

16. On page 15 of the *Consolidated Rail Corp. v. STB* decision, *Id.*, the court stated:

“The FSP [Final System Plan] designated for transfer to Conrail certain ‘rail lines,’ FSP at 261 (JA 842), which ‘[u]nless otherwise specified ... include[] all rail properties ... **connected with**, controlling or in any way pertaining to or **used or usable** by the designee in connection with the rail line designated including ... connecting spur and storage tracks.’ *Id.* at 241 (JA 965).” (Emphasis added.)

17. The railroad bridge over Beaver Dam Run was washed out by Hurricane Agnes on June 22, 1972. The railroad bridge over the Codorus Creek in Pennsylvania, a hundred feet or so north of Hanover Junction (about ½ mile south of Seven Valleys, PA), was also washed out. The Penn Central Transportation Company elected not to repair or replace these two bridges. Instead, in September, 1972, it filed to abandon that portion of the Northern Central Line that lies between Cockeysville, MD and Hyde, PA (about 5 miles north of Hanover Junction). Consequently, service between Cockeysville and Hanover Junction was no longer possible after June 22, 1972, since this segment was no longer 'connected' to the National Rail System.¹

18. The FSP, on p. 241, noted that the FSP was transferring to Conrail those line segments **"connected with, ... or used or usable by the designee"** Since that segment of the Northern Central line that was located between Beaver Dam Run in Cockeysville, MD, and Codorus Creek at Hanover Junction, in Pennsylvania, was no longer **"connected with, or used or usable by the designee in connection with the rail line designated,"** I argue that the FSP **did not convey** this portion of the Northern Central Line to Conrail, and that therefore, **the STB has no jurisdiction over this segment.** In ¶¶ 31-32 I argue the cut line may be at old MP 14.4.

19. NSR, in its Petition for Exemption, stipulated that it sought to abandon to Milepost UU 15.44, which appears to be at Western Run. I base this conclusion on the following:

A. Mr. Riffin has admitted into the record Mr. Robert Williams' Exhibit C-5, which depicts that portion of the Line that traverses the stations of Texas

¹ The State of Pennsylvania objected to the abandonment of that portion of the Northern Central Line that lies between Hyde, PA and the Maryland / Pennsylvania line. After protracted litigation, the State of Pennsylvania bought this segment of the Line, then replaced the Codorus Creek railroad bridge that had been washed out by Hurricane Agnes, thereby preserving this segment for continued rail service. The State of Maryland filed no objection to the abandonment of the segment that lies between Cockeysville, MD and the Maryland / Pennsylvania line. The Interstate Commerce Commission never acted on the Maryland abandonment petition. This segment was ultimately abandoned by the Final System Plan, when it was not included in Final System Plan, due to this segment not being **"connected with, ... or used or usable by the designee in connection with the rail line designated."**

(south of old MP 14) and Ashland (south of old MP 16). This Exhibit states that the "York Turnpike" undergrade bridge is at old MP 14.85. This Exhibit further notes an undergrade bridge at old MP 15.05, where the Veneer Spur is depicted as being connected to the CIT. There is a 6-foot diameter culvert at this location. Another undergrade bridge is depicted at old MP 15.16. This MP 15.16 bridge is 0.31 miles from the York Road bridge, or about 1,636 feet. [15.16 minus 14.85 = 0.31 miles = 1,636.8 feet.] A land survey by Thompson and Associates, shows the distance from the center of York Road to the center of Beaver Dam Run, along the center line of the right-of-way, is 1,529 feet. From this I would conclude that the undergrade bridge depicted at MP 15.16 is the bridge that crossed Beaver Dam Run.

- B. Scaling an ADC map from York Road to the center of Western Run along the center line of the right-of-way, gives the distance from York Road to Western Run as 3,149 feet. This is close to the distance as computed from Exhibit C-5: 3,115 feet. [15.44 minus 14.85 = 0.59 miles = 3,115.2 feet.] From this I would conclude that the bridge depicted at MP 15.44 is the bridge over Western Run.

20. Appended as Exhibit B to the MTA's April 26, 2010 Reply is a photocopy of p. 505 of Volume II (Part III) of the Final System Plan, dated July 26, 1975. The heading states: "The following Out of Service and Intermittently Served Lines are not Designated for Transfer to Consolidated Rail Corp." For Line 145, the following notes appear:

"[Termini:] Hyde, Pa (Milepost 54.6) to Cockeysville, Md (Milepost 15.4).
[Date Last Used:] June 23, 1972 **[Reason Out of Service and**
Comments:] Damaged by 'Agnes.' The Cockeysville Industrial Park lies south of Milepost 15.4 and will continue to receive service."

21. The Final System Plan said that it was transferring to Conrail only to MP 15.4. Where MP 15.4 is actually located, is unknown at this time. The "Out of Service" notes state that the date Milepost 15.4 was last used, was September 23, 1972, and further state the reason was: "Damaged by 'Agnes.' "

22. The bridge over Western Run, which is about 1,500 feet north of Beaver Dam Run, was not damaged by Hurricane Agnes. Today it is still intact, and with the addition of a new set of railroad ties, would be fully functional. Western Run is just a few hundred feet south of the former Ashland Station. The Cockeysville Station was located a few hundred feet north of York Road, or about 1,400 feet from the Beaver Dam Run bridge that Agnes washed out. Had the 'Out of Service' note been referring to Western Run, it would have said to Ashland, at MP 16, rather than to Cockeysville, at MP 15.4. Since the Western Run bridge was not damaged by Agnes, while the Beaver Dam Run bridge was totally obliterated by Agnes, the "Damaged by 'Agnes' " note was more likely referring to the Beaver Dam Run bridge.

23. Since the purpose of the Final System Plan was to retain those portions of line that were, as of July 26, 1975, "**connected with, or used or usable** by the designee in connection with the rail line designated," and since that portion of the CIT that was located north of Beaver Dam Run was incapable of being served by rail on July 26, 1975 (due to the obliteration of the Beaver Dam Run bridge), it is more probable that the intent was to convey to Conrail only to the south side of Beaver Dam Run, rather than to the south side of Western Run.

24. A physical inspection of the right-of-way on the south side of Beaver Dam Run would reveal a large mound of dirt on top of the mainline track, about 400 feet south of the south Beaver Dam Run bridge abutment. This mound of dirt would constitute a very effective end-of-track 'bumper.' Consequently, it is more likely than not, that the south side of this mound of dirt was the maximum northerly extent of the CIT that was "**connected with, or used or usable** by the designee in connection with the rail line designated." In ¶¶ 31-32 I argue the cut line may be at old MP 14.4.

25. I herewith **challenge** the STB's jurisdiction to "consider [NSR's] petition," since NSR's Petition "falls within the 'original and exclusive jurisdiction' of the United States District Court for the District of Columbia as successor to the Special Court 'to interpret ... [an order] entered by [the Special Court].'" *Consolidated Rail Corp. v. STB*, *op. cit.* at 19.

26. I argue that the extent of the conveyance by the FSP to Conrail must be determined **prior** to the STB granting NSR any abandonment authority on the CIT. The **precise** location of the 'cut line' on the right-of-way must be determined, so that reversionary property interests may be precisely determined. This can only be done by the successor to the Special Court.

27. In this proceeding, the STB can neither go 'long' nor 'short.' If the end of the STB's abandonment authority is 'short' of where the FSP conveyed to Conrail, then a stranded segment will result. If the end of the STB's abandonment authority is 'long,' i.e., beyond the point where the FSP conveyed to Conrail, then the STB will have granted abandonment authority over real estate that the STB does not have any jurisdiction over.

28. Since NSR has petitioned to abandon to the end of the CIT, or to that most distant point conveyed by the FSP to Conrail in 1975, the precise extent of what was conveyed by the FSP to Conrail must be determined.

29. NSR has stated that it intends to abandon to MP 15.44, but fails to precisely state where MP 15.44 is located. This is what the FSP had to say about mileposts:

"Milepost designations are not always precise and, therefore, milepost designations in the appendix are necessarily approximate. The valuation maps generally reflect historical designations which were made when the lines were built. Through the years, portions of lines have been relocated, and mileposts on some lines have been renumbered. Milepost designations contained in the track charts do not always correlate with the valuation maps, although these discrepancies have been minimized to the extent possible. Further, milepost

designations in operating timetables may not always reflect either track charts or valuation maps, particularly where two formerly separate lines are now used as a part of one through route. And, in a few instances, the physical mileposts on the ground may not correspond to any of the above records. FSP Vol 1, p. 241.

30. The mileposts on Mr. Williams' Exhibit C-5 may not be 'precise,' and 'may not correspond to any of the above records [FSP records].' Mr. Williams' Exhibit C-5 indicates that milepost 15.44 is where Western Run is located. This conflicts with the FSP's statement that it intended to convey only those lines that were "used or usable" as of July, 1975, since on July, 1975, it was not physically possible to move a rail car farther north than the mound of dirt that is on the main line several hundred feet south of the south side of Beaver Dam Run, which is almost 2,000 feet south of Western Run, and may not have been possible to move a rail car farther north than the "end of rail" at old MP 14.4. See ¶¶ 31-32 where I argue the cut line may be at old MP 14.4.

31. Mr. Williams testified, which testimony the STB accepted as gospel truth, that his Exhibit C "reflects conditions existing as of 1965," Williams' Verified Statement ("VS") at 1; that the track north of York Road was removed prior to the MTA's acquisition of the CIT in 1990, VS at 2, and that the Veneer Spur "connection ... has been gone since the 1940's." VS 2-3. In its April 20, 2007 Response of the MTA, in FD No. 34975 – *Maryland Transit Administration – Petition for Declaratory Order*, the MTA stated: "In his Verified Statement, Mr. Williams describes the changes to the line since MTA acquired it. See VS Williams at 2-3, ¶¶ 6 (a) - (f). 7."

32. Mr. Williams' Map 2.4 shows a "Barricade" at station 17+49 and shows rail has been removed at Station 17+55. ["end of rail (17+55)"]. [Barricade (17+49) = 1,749 feet north of where station zero is located: "Point of switch (0+00) Mainline (760+54)."] Mr. Williams' Map 2.4 shows "Bridge No. 760-N (U.G.)" between "Point of switch" at station 760+08 and "Point of switch" at station 760+54. Mr. Williams' Exhibit C-5 shows an "U.G. Br" at 14.16. If the U.G. Br. at MP 14.16 is Bridge No. 760-N between Station 760+08 and 760+54, then the barricade would be at MP 14.49. [1749' = 0.33 miles. 0.33 miles + 14.16 = 14.49.] Since the "barricade" is at MP 14.49, which is 14.4 when the last digit is dropped, it is possible that the FSP meant to convey

to MP 14.4 rather than to MP 15.4, since MP 14.4 is the farthest north Conrail would have / could have operated on the CIT, in order to access the Cockeysville Industrial Park track.

33. 45 U.S.C. 719(e)(2) states:

“(2) The original and exclusive jurisdiction of the special court shall include any action, whether filed by any interested person or initiated by the special court itself, to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 743(b) of this title in order to effect the purposes of this chapter or the goals of the final system plan.” (Bold added.)

34. All of this discussion leads to the conclusion that NSR, the STB, and none of the parties, have any idea what the FSP conveyed to Conrail. The FSP could have conveyed to MP 14.4, which is where the line is barricaded; to the old freight station, where the last vestige of rail can be seen; to York Road; or to the mound of dirt on one remaining stick of rail, several hundred feet south of Beaver Dam Run.

35. Since it cannot be determined from NSR's petition what the FSP conveyed to Conrail, NSR's petition must be rejected. The matter must be referred to the Special Court's successor, so that the extent of what was conveyed to Conrail by the FSP can be determined. Following that, NSR could then repetition the STB to abandon what the Special Court holds the FSP conveyed to Conrail.

36. I adopt by reference herein, as if fully stated herein, all of the comments, allegations and legal arguments put forth by Mr. Riffin in his Petition to Stay and Petition to Reopen, except where they conflict with what I have argued, *supra*.

37. I certify under the penalties of perjury that the above is true and correct to the best of my knowledge, information and belief.

Executed on May 14, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2010, a copy of the foregoing Comments, etc., was served by first class mail, postage prepaid, upon John Edwards, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241, Charles Spitulnik, Kaplan Kirsch, Ste 800, 1001 Connecticut Ave NW, Washington, DC 20036, and was hand delivered to Zandra Rudo, James Riffin and Lois Lowe and was served via e-mail upon Eric Strohmeyer.



Carl Delmont